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TAKING ‘HEALTH’ AS A SOCIO-ECONOMIC RIGHT SERIOUSLY: IS THE SOUTH AFRICAN CONSTITUTIONAL DIALOGUE A REMEDY FOR THE AMERICAN HEALTH CARE SYSTEM?

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INTRODUCTION

Nineteen ninety-six marked the beginning of a new era for South Africa. After a long struggle to free itself from the apartheid regime, it had successfully drafted “the most admirable constitution in the history of the world”¹. Nonetheless everything still had to be done to reconcile the social and economic fracture that was tearing apart the country. This document had to provide continual reinvention to make sense of a changing world and the new South Africa.² The answers provided by the Constitution had to be more than ‘admirable’, they had to be ‘transformative’. Indeed, unlike most liberal constitutions, the primary concern was not to restrain State power, but to accelerate fundamental changes in a legacy of injustice resulting from over three centuries of colonial and apartheid rule.³

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¹ C.R. Sunstein, *Designing Democracy: What Constitutional Do*, Oxford University Press (2001).

² Karl E. Klare, *Legal culture and transformative constitutionalism*, 14 SAJHR 146-155, 155 (1998).

³ S. Liebenberg, *Protecting Economic, Social & Cultural Rights under Bill of Rights: the South African Experience*, 16 (3) HUMAN RIGHTS DEFENDER (2007) 2-6, at 2.

It soon became obvious to the drafters that without access to basic levels of social and economic services, no effective civil or political changes could take place in the deeply divided country. Hence, the final document incorporates a detailed list of socio-economic rights tailored to the peculiar needs and context of South Africa.⁴

Nonetheless, concerns were then raised with regard to a blurry separation of powers that would stem from the interpretation of these rights.⁵ The nuance these rights require for their enforcement portrays the flexibility that is expected on the part of the judiciary, the executive, and the legislative branch when it comes to fulfilling their respective responsibilities. This approach results in the overlapping of spheres of authority.⁶ A fluid, dialogic model of separation of powers is to be preferred for the promotion of a transformative jurisprudence on socio-economic rights. Certainly, the questions of allocation socio-economic right litigation trigger call for a more cooperative and flexible relationship between the branches.⁷

Today, South Africa continues fighting its demons with the help and trust it has put in its institutions and the pre-eminent role it has given to its Constitutional Court. Even if sometimes subject to criticism, the contextualising method practiced by the Court remains a progressive way of enforcing individual and collective rights.

⁴ Ibid, at 2.

⁵ S. Seedorf & S. Sibanda, Separation of Powers, in S Woolman and M Bishop (eds), *Constitutional Law of South Africa Vol.2*, JUTA (2002), 12.

⁶ Ibid.

⁷ S. Ngcobo, *South Africa's Transformative Constitution Towards an Appropriate Doctrine of Separation of Powers*, 2 STELLENBOCH LAW REVIEW (2011) 37-49, at 41.

Interestingly enough this model, although saluted by many democracies, does not trigger a renewal in constitutional methodologies. In fact, the United States Supreme Court has not only been reluctant to recognise or incorporate socio-economic rights in its Constitution and legislation, it also remains firm in its appreciation of a 'pure' form of separation of powers showing no real sensitivity to the American social or historical context when ruling on resource allocation.⁸

The United States Constitution as the oldest written nation-governing charter in the world⁹ is determined to stand firm on its ground. The strict balance of power that characterises the American system makes it averse to the concept of socio-economic rights, and unwelcoming to any flexibility. Unfortunately, this static conception of the separation of powers presents certain limitations and fails to account for the shifting nature of society.¹⁰

Taking a closer look at urgent issues affecting America one cannot help but wonder why the Supreme Court has not yet learned some of the lessons from its South African counterpart when it comes to allocation of its health care resources. The debate surrounding the Patient Protection and Affordable Care Act's (ACA)¹¹

⁸ M.S. Kende, *The South African Constitutional Court's Embrace of Socio-Economic Rights: A Comparative Perspective*, 6 CHAP. L. REV. (2003) 137-160.

⁹ Ibid at 160.

¹⁰ S. Liebenberg, *Socio-economic Rights Adjudication Under a Transformative Constitution*, JUTA (2010).

¹¹ H.R. 3590, 111th Cong. (2009-2010), Public Law 111-148.

certainly brought up issues of constitutionality,¹² and more particularly the central question of Congress' capacity to impose the purchase of health insurance on all Americans. It is as if the insurance industry crisis and the un-insurability of millions of Americans were slightly overlooked and clouded by constitutional questions. Unfortunately, allocation issues were left in the background, the Court preferring to adopt a deeply federalist approach in its resolution of the case.

The path of dependency on which America has been evolving for the past century now translates into actual scarcity issues and an ill-suited insurance system. These important shortcomings are surely a result of a profound miscomprehension on the part of the government, the legislature but also the judiciary.

Using a comparative functionalist approach, this article aims at presenting the differences in the role played by the Supreme and Constitutional Court when it comes to the adjudication of the right to health, and more broadly socio-economic rights. The constitutional implications entailed in the allocation of health care resources will also be developed in both contexts. First, the originality of the South African model of socio-economic right adjudication will be analysed, focusing on four land-mark cases that illustrate the 'distinctive' nature of the South African Constitution and the Court's evolving standard of review. Second, the relationship between the different branches of government and the dialogue they maintain in

¹² Congress' capacity to impose the purchase of insurance health insurance on all Americans has been questioned. The answer lies within the Commerce Clause that grants Congress with the power "to regulate commerce...among the several states" U.S. CONST., art. I, §8, cl. 3.

order to enforce socio-economic rights will be fleshed out, giving particular attention to the Court's contextualising efforts. Contrastingly, the American model of 'strict' separation of powers and its implications for the distribution of health resources will be presented. Finally, arguments will be made in favour of a more contextualised resolution of allocation cases by the American Supreme Court, and a more robust approach in the implementation of remedial measures by the South African Constitutional Court.

I. ADJUDICATION OF SOCIO-ECONOMIC RIGHTS AND THE IMPORTANCE OF CONTEXTUALISATION

A. The 'Holistic' List of Socio-Economic Rights

The shift from the parliamentary sovereignty regime of the apartheid era to the system of constitutional democracy with an entrenched and justiciable Bill of Rights is by far the most outstanding structural and normative change South Africa has undergone.¹³ The Bill of Rights created legal foundations for the establishment of a true democracy for South Africa helping to build the new "rainbow nation".¹⁴

¹³ S. Liebenberg, *supra* note 11.

¹⁴ Term coined by Archbishop Desmond Tutu, the phrase was elaborated upon by President Nelson Mandela: "Each of us is as intimately attached to the soil of this beautiful country as are the famous jacaranda trees of Pretoria and the mimosa trees of the bushveld- a rainbow nation at peace with itself and the world".

This resulted in sections 26(1) and 27(1) of the Constitution granting everyone with the right to access: “adequate housing; health care services, including reproductive health care; sufficient food and water; and social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.”¹⁵ Duties were also imposed on the State to “take reasonable legislative and other measures, within its available resources, to achieve progressive realisation of each of these rights”.¹⁶

During the drafting stages extensive debates with regard to the inclusion of socio-economic rights animated the authors. Opponents to their inclusion argued that the judicial enforcement of these rights would result in a breach of the separation of powers leading to judicial usurpation of governmental powers over budgetary matters and social policy. The lack of institutional legitimacy, or required training and skills of the judiciary to make such decisions was also heavily highlighted.¹⁷ Some even argued that the inclusion of these rights would raise unrealistic expectations with regard to their enforcement.¹⁸

Nonetheless, it was obvious that without access to basic levels of social and economic services and resources, no effective civil or political changes could take

¹⁵ S.A. CONST. ch. II, § 26, cl.1, and §27, cl.1.

¹⁶ S.A. CONST. ch. II, §27, cl.2.

¹⁷ S. Liebenberg, *supra* note 3.

¹⁸ M. Pieterse, *A Benefit Focused Analysis of Constitutional Health Rights* (2005).

place in the deeply divided country.¹⁹ Therefore, the final document had to incorporate the idea of separation of powers in a manner that could meet the peculiar needs of the South African context. It was also contended, that elevating these second generation rights to the rank of immutable constitutional values would leave intact the legitimacy of the Bill of Rights, and help to safeguard the institutional legitimacy of the judiciary, without stirring significant separation of powers and counter-majoritarian tensions.²⁰ Obviously socio-economic rights matters would involve choice-sensitive and polycentric issues, but the Court would have the tools to face the challenges of rationing and prioritising resources.²¹

The South African Constitution became internationally renowned for the inclusion of its holistic set of socio-economic rights.²² These rights are certainly the most innovative part of the Constitution. They are the foundation for a new society based on social justice and a more just distribution of resources.²³ They also provide mechanisms for disadvantaged groups to hold the State accountable, avoiding having their fundamental needs disregarded, and assist the State in defending redistributive social legislation and programmes.²⁴ Socio-economic rights remain a valuable democratic safeguard. In a similar manner as the election cycle, they provide a

¹⁹ Ibid.

²⁰ M. Pieterse, *supra* note 20.

²¹ Ibid.

²² S. A. CONST. ch. II, art. 22-23, and 25-27.

²³ S. Liebenberg, *supra* note 3.

²⁴ S. Liebenberg, *supra* note 11.

compliance mechanism indirectly holding the executive accountable to its positive duties.

B. The Positive/Negative Right *Suma Divisio* Revisited

The South African Constitution ultimately aims at facilitating and promoting the enjoyment of rights. Socio-economic rights are not merely pre-existing entitlements they are activated under the justiciable Bill of Rights. In fact, the State is required to act positively to ensure their realisation. Prescriptions are made to the government to undertake affirmative action programmes,²⁵ and provisions on the way property redistribution has to be carried out are also included.²⁶

Socio-economic rights form a strong web of duties and rights imposed both on the State and the individual. It is their interrelated, interdependent and mutually supportive character that finds strength in the structure and the text of the Constitution. Section 7 confirms that all rights enclosed in the Bill of Rights impose both positive and negative obligations on the State.²⁷ The traditional *suma divisio* separating human and constitutional rights into ‘positive’ and ‘negative’ categories is dissolved. These rights require the protection but also the input from all branches of government giving them their dual nature.

²⁵ S.A. CONST. ch. II, §9, cl.2.

²⁶ S.A. CONST. ch. II, §25, cl.2.

²⁷ P. De Vos, *Grootboom, the Right of Access to Housing and Substantive Equality as Contextual Fairness*, 17 S. AFR. J. ON HUM. RTS. (2001), 258-276, at 260-261.

Central objections have been raised with respect to the characterisation of social and civil rights as respectively positive and negative rights. In this view, positive rights are seen as requiring extensive State action and resources to be realised. Therefore, the legal enforcement of positive rights would require courts without institutional competence to make judgment calls on budgetary allocation and social policy, partly breaching the traditional conception of democratic separation of powers.²⁸ Nonetheless, socio-economic rights are still adjudicated as bearing both negative and positive duties. This atypical interpretation of Bill of Rights is necessary to insure the realisation of the Constitution's transformative goals. A flexible implementation on the part of the Court is necessary and the collaboration of the executive in this area is essential.

Judgements relating to the adjudication of socio-economic rights have reaffirmed the importance of this 'revisited' *suma divisio*. The Court indicated that socio-economic rights were "at least to some extent, justiciable", and "[a]t the very minimum... negatively protected from improper invasion"²⁹. In cases such as *Grootboom v Government of the Republic of South Africa and Others*³⁰ (*Grootboom*) the Court confirms that the right of access to housing creates both negative³¹ and positive³²

²⁸ L. Forman, What future for the minimum core? Contextualising the implications of South African Socioeconomic Rights Jurisprudence for the International Human Right to Health, in J. Harrington and M. Stuttaford (eds), *Global Health and Human Rights Legal and Philosophical Perspectives*, Routledge Research in Human Rights Law (2010) 62-80.

²⁹ *Ex parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa* ¶78 (1996). ('*Certification of the Constitution*')

³⁰ *Government of the Republic of South Africa v Grootboom & Others*, SA 46 (2001). ('*Grootboom*')

³¹ *Ibid.* at ¶34; *See also, Jafra v Schoeman* (2005) 2 SA 140 (CC), in this case the cost of implications of resource free negative obligations are well presented. The Constitutional Court held that civil procedural

obligations for the State. While the decision is certainly an endorsement of the justiciability of social rights, the qualification made by the Court in this regard also reflects a new approach to their enforcement.³³

C. The ‘Reasonableness’ Standard of Review: a Benchmark for Distribution

The South African Constitutional Court has developed a unique method of review for claims that seek the enforcement of positive duties imposed by socio-economic rights. While rejecting the interpretation of sections 26 and 27 as granting individuals with a claim to direct provision of essential basic level of goods and services from the State, the Court also rejects the so-called ‘minimum core obligation’ coined by the General Comments of the United Nations Committee on Economic, Social and Cultural Rights under the *International Covenant on Economic, Social and Cultural Rights* (CESCR).³⁴ The Court has argued that it lacks the necessary information to specify the content of the minimum core obligations due to the diversity of needs of the different groups present in South Africa³⁵. It goes further in

measures in the Magistrate’s Courts Act that allowed the sale in the execution of people’s homes without judicial oversight constituted a negative breach of the section 26(1) right to adequate housing that could only be justified by a robust limitation analysis in terms of the s36 general limitation clause.

³² Ibid. at ¶38.

³³ L. Forman, *supra* note 32.

³⁴ The concept of minimum core obligations’ was initially adopted by the Committee in its General Comment 3, *The Nature of States Parties obligations [art 2(1) of the Covenant]*, UN Doc E/1991/23(1990)[10].

³⁵ *Grootboom* at ¶33.

its criticism by saying that the notion is inconsistent with the institutional roles and competencies of the judiciary.³⁶

The landmark decision of *Grootboom* adopts a new standard of review. The concept of ‘reasonable measures’ requires the consideration of the “degree and extent of the denial of the right the [claimant] endeavours to realise.”³⁷ The Court adds that “[t]hose whose needs are most urgent and whose ability to enjoy all rights is therefore most in peril, must not be ignored by the measures aimed at achieving realisation of the right.”³⁸

The assessment of the reasonableness of governmental programmes was influenced by two factors. First, the internal limitations of sections 26(2) and 27(2)³⁹ that require the rights to be “progressively realised”⁴⁰, and second the availability of resources as “an important factor in determining what is reasonable”⁴¹. In a nutshell, the reasonableness standard of review insists that the benchmark should be set according to whether or not measures taken by the State to implement programmes for the progressive realisation of the relevant rights were reasonable.⁴²

³⁶ Minister of Health & Others v Treatment Action Campaign & Others, ¶ 37-38, 5 SA (2002). (*T.A.C.*).

³⁷ *Grootboom* at ¶44.

³⁸ *Ibid.*

³⁹ S.A. CONST. ch. II, § 26, cl.1, and §27, cl.1.

⁴⁰ *Grootboom* at ¶99.

⁴¹ *Ibid.* at ¶46.

⁴² S. Liebenberg, *supra* note 3, at 3.

In his commentary on the South African Constitutional Laws⁴³ David Bilchitz gives some precisions with regard to the reasonableness standard introduced by *Grootboom*. He quotes his fellow colleague Cora Hoexter to explain that the reasonableness standard should be understood as partially reminiscent of its use in administrative law. Simply put,

“A reasonable decision is one that is supported by reason and evidence, rationally connected to purpose, and is objectively capable of furthering that purpose. A reasonable decision generally also tends to reflect proportionality between ends and means, and between benefits and detriments.”⁴⁴

Critiques of this alternative approach suggest that the Court missed an opportunity to act as a more effective agent of social change. Simply identifying the content of each right could have provided a more concrete meaning to socio-economic rights.⁴⁵ Had the Court taken the lead on this issue, the executive would have benefited from a clearer understanding of the constitutional requirements necessary to realise a progressive program. Individuals, on the other hand, would have found it easier to hold the executive accountable for its failure to deliver their most pressing needs.⁴⁶

⁴³ D. Bilchitz, Health, in S Woolman and M Bishop (eds), *Constitutional Law of South Africa Vol.2*, JUTA (2002), 56A.

⁴⁴ C. Hoexter, *The Future of Judicial Review in South African Administrative Law*, 117 SALJ (2000).

⁴⁵ D. Bilchitz, *Towards a Reasonable Approach to the Minimum Core: Laying the Foundation for Future Socio-economic Rights Jurisprudence*, 19 SAJHR (2003) 1-26, at 8; *See also*, for an example of concrete interpretation of socio economic right, Social and Economic Rights Action Center & the Center for Economic and Social Rights v Nigeria, African Commission on Human and People's Rights Communication No. 155/96 (2001).

⁴⁶ K. Lehmann, *In Defense of the Constitutional Court: Litigating Socio-Economic Rights and the Myth of the Minimum Core*, 22 AM. U. INT'L. REV. (2006-2007) 163- 197, at 165.

By adopting the reasonableness standard of review rather than a stout right-based approach the Court diminished its institutional voice and the one of vulnerable groups. Indeed, this standard requires the understanding of complex and budgetary issues “making it all but impossible for poor people to bring [socio-economic] rights cases without extensive technical and financial support”⁴⁷.

In point of fact, the primary concern raised with respect to the reasonableness standard is its indeterminacy. No specific temporal priorities to guide the timely realisation of policy or programmes are clearly stated, nor are the urgency, desperation, and the key population of the poor and vulnerable affected by the enforcement of this standard clearly defined.⁴⁸ Some commentators remain convinced that this standard will endanger the balance of power present between South African institutions.⁴⁹

At the very minimum, the context-bound nature of this standard calls for some specification to better appraise the government’s actions in a variety of situations. In other words, when determining the ‘reasonableness’ of a governmental conduct a presupposed ‘acontextal’ standard should be used to lead the evaluation.⁵⁰

⁴⁷ J. Dugard, *Courts and the Poor in South Africa: a Critique of Systemic Judicial Failures to Advance Transformative Justice*, 24 SAJHR (2008) 214-238, at 236.

⁴⁸ L. Forman, *supra* note 32.

⁴⁹ K. Lehmann, *supra* note 50, at 178.

⁵⁰ D. Bilchitz, *supra* note 49, at 10.

D. Landmark Cases: Understanding the Diversity in Judgment

The socio-economic rights jurisprudence develops on a case-by-case basis. A cumulative reading of the constitutional judgments shows that some guiding principles help the Court in its goal of distilling a ‘distinctively South African model of separation of powers’.⁵¹ At a conceptual level the Court makes no real difference between its approach to traditional civil and political rights from the adjudication of any other rights, nonetheless it is of prime importance to closer examine allocation of resources cases. This specific set of cases helps to better understand how the notion of separation of power has become crucial in the just distribution of state resources.⁵²

1. Soobramoney v Minister of Health (Kwazulu-Natal)

Mr. Soobramoney brought a challenge before the Court to compel the KwaZulu-Natal health department to provide him with an onerous treatment.⁵³ At the time of the application, Mr. Soobramoney was forty-one years old, unemployed and suffered from critical chronic renal failure. Regular renal dialysis could have prolonged his life, but it was unclear for how long.⁵⁴ The indigent applicant could not afford the dialysis from the private sector, and therefore was seeking it from a state hospital.⁵⁵ The hospital refused his application for failure to meet the eligibility criteria of the dialysis program due to his multiple medical conditions.⁵⁶ It is

⁵¹ S. Seedorf and S. Sibanda, *supra* note 6.

⁵² *Ibid.*

⁵³ *Soobramoney v Minister of Health (Kwazulu-Natal)*, ¶3, 1 SA (1998). (*‘Soobramoney’*)

⁵⁴ *Ibid.* at ¶1.

⁵⁵ *Ibid.* at ¶5.

⁵⁶ *Ibid.* at ¶3.

important to note that at the time of the case many South Africans in that province could not even have access to any form of health care services.⁵⁷

In *Soobramoney v Minister of Health (Kwazulu-Natal)* (*Soobramoney*) the Court sided with the State. It rejected the argument that the hospital violated Mr. Soobramoney's right to health care by putting in place a rational policy to ensure that a scarce resource was made available to a specific segment of the population.⁵⁸ The decision seemed to indicate that the constitutional right to health held little force against policy-making or resource allocation considerations.⁵⁹ The Court explained that at the functional level priorities had to be set:

“What is apparent from these provisions is that the obligations imposed on the state by section 26 and 27 in regard to access to housing, health care, food, water and social security are dependent upon the resources available for such purposes, and that the corresponding rights themselves are limited by reasons of the lack of resources. Given this lack of resources and the significant demands on them that have already been referred to an unqualified obligation to meet these needs would not presently be capable of being fulfilled. This is the context within which section 27(3) must be construed.”⁶⁰

The Court aimed to demonstrate that decisions should be taken at the political level to tailor the health budget around the population's needs.⁶¹ The Court did not want to interfere with this rational decision-making process since it believed the

⁵⁷ P. De Vos, *supra* note 31, at 260.

⁵⁸ *Soobramoney* at ¶25.

⁵⁹ D. Moellendorf, *Reasoning about Resources: Soobramoney and the Future of Socio-Economic Rights Claims*, 14 S. AFR. J. ON HUM. RTS. (1998) 327; and C. Ngwenya, *The Recognition of Access to Health Care as a Human Right in South Africa: Is it Enough?*, 5 HEALTH AND HUMAN RIGHTS (2000) 33.

⁶⁰ *Soobramoney* at ¶11.

⁶¹ K. Lehmann, *supra* note 50, at 165.

allocation was made by State institutions in good faith and to the best of their capabilities.⁶² By siding with the claimant the Court felt it would not have been implementing socio-economic rights, but rather infringing the executive's power.

The Court made a point of reiterating its role and the respect it had for the division of powers. It felt it should not be allocating resources, but rather had to confine its task to the determination of whether or not the distribution of such resources was made in accordance with the provisions of the Constitution.

However, the Court should have kept in mind that the inclusion of a justiciable right to health in the Bill of Rights would call for the creation of a substantive benchmark for allocation. Inevitably, the content of this right has to impact the prioritisation processes involved in rationing.⁶³ This case exemplifies the Court's challenge and reluctance in interpreting the right to life and emergency medical treatment as requiring the prioritisation of life-saving treatment over other medical needs. It may very well be that the Court's restrictive interpretative approach betrays its discomfort with regard to the ranking of applicants' needs triggered by the adjudication of socio-economic rights. Unfortunately, this 'priority-free' interpretation may have stifled the dialogue over the development of principles guiding health rationing processes.⁶⁴

⁶² *Soobramoney* at ¶29.

⁶³ See also P. Carsten and D. Pearmain, *Foundation Principles of South African Medical Law*, Butterworths LexisNexis (2007).

⁶⁴ M. Pieterse, *Health Care Rights, Resources and Rationing*, 127 SALJ (2007) 514- 536, at 527.

The *Soobramoney* case is putting the finger on a sensitive issue present in a majority of developed countries at the dawn of the twenty first century. Courts now have to decide whether the value of an individual life should prevail over the quality of life of a larger group. This problem has been approached pragmatically in South Africa, nonetheless it still raises some fundamental ethical questions. The case has set the table for all issues of separation of powers and resources allocation the South African Constitutional Court would have to address in the following socio-economic rights cases.

2. Grootboom and Others v Government of the Republic of South Africa and Others

In 2001, only a few years after the *Soobramoney* case, the Constitutional Court heard one of its most important and revolutionary socio-economic right cases. The *Grootboom* case finally created a benchmark in the development of a more general test for the adjudication of constitutional rights.⁶⁵ With this decision the Court reaffirmed its commitment to the enforcement and the justiciability of social and economic rights guaranteed by the Constitution.⁶⁶

Mrs. Grootboom sought relief from the Court after having been evicted from the land she was occupying.⁶⁷ The applicant and her family started squatting on

⁶⁵ *Grootboom* at ¶¶60-64.

⁶⁶ Pierre De Vos, *supra* note 31, at 261.

⁶⁷ *Grootboom* at ¶3.

private land after the shack in which, her and fellow applicants, were living in became inhabitable because of its “intolerable”⁶⁸ conditions.⁶⁹

This case very well illustrates the revisited *suma diviso* animating socio-economic rights. Although section 26(1) does not expressly place a negative obligation upon the State and all other entities and persons to desist from preventing or impairing the right of access to adequate housing, such a duty was implied.⁷⁰ Even with both positive and negative obligations found in the right to housing the Court held back on dictating policy. In fact, the Court even gave the government discretion as to how to comply with the law.⁷¹

The Court held that the State had no obligation to provide shelter to Mrs. Grootboom as an individual. It also found that the housing programme was unconstitutional as it was ‘unreasonable’.⁷² The new standard of review was then expounded. Unreasonableness resulted from the lack of coordination and understanding on the part of all spheres of government that failed to create a policy answering the pressing housing needs in South Africa. Indeed, the programme in place only catered for medium and long-term housing solutions.⁷³ No provision was

⁶⁸ Ibid. at ¶3.

⁶⁹ Ibid. at ¶7.

⁷⁰ L. Henkin, S. Cleveland, L.R. Helfer, G.L. Neuman, and D.F. Orentlicher, *Human Rights*, 2nd ed. (2009).

⁷¹ M. S. Kende, *supra* note 9, at 145.

⁷² *Grootboom* at ¶69.

⁷³ Ibid. at ¶66.

made for a short-term housing solution for those “whose needs [were] the most urgent and whose ability to enjoy all rights therefore [were] most in peril.”⁷⁴

Grootboom demonstrates that placing socio-economic rights in a constitution does not equate to providing individuals with assistance on demand. It is the idea that an entire ‘sensitive’ group could be left out of a social policy that shocked the Court. Indeed, “[a] program that excludes a significant segment of society cannot be said to be reasonable.”⁷⁵ The reasonableness standard was further refined, reinterpreting section 26 stating that “[t]he state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.”⁷⁶ The Court also added that the program must not only be ‘reasonable’, it needed to be “reasonably implemented, [since] an otherwise reasonable programme that [was] not implemented reasonably [would] not constitute compliance with the State’s [positive] obligations.”⁷⁷

The Court proceeded with an order spelling out the obligations of all three spheres of government. Unfortunately, the order lacked specificity as to how the obligations had to be carried out. The lack of clarity of this measure was later exploited by local and federal governments to shy away from its implementation.⁷⁸

⁷⁴ Ibid. at ¶44.

⁷⁵ Ibid. at ¶42.

⁷⁶ S. A. CONST., ch. II, §26, cl.1.

⁷⁷ *Grootboom* ¶42.

⁷⁸ “Apart from endorsing an undertaking by the South African Human Rights Commission to monitor the implementation of its order (which implied that the provincial government had to amend its housing plan

While *Grootboom* was setting new standards for socio-economic rights cases, it also created some uproar because of its rejection of the minimum core standard. The transition to a ‘reasonableness’ standard was perceived as a failure due to the short-changing of social rights provisions of the Constitution.⁷⁹ The Court had decided to take into consideration the country’s overwhelming poverty and its constitutional commitment to equality, dignity and freedom to justify the decision rather than to specify the content of the minimum core.⁸⁰

3. Minister of Health and Others v Treatment Action Campaign and Others

In the Minister of Health and Others v Treatment Action Campaign and Others (*T.A.C.*) case, a group of organisations brought a challenge against the government with regard to the provision of Nevirapine, a drug given to HIV positive pregnant women to protect their foetuses from HIV infection.⁸¹ The drug had not been made available to all of women at state clinics and hospitals because of the government’s concerns with the drug’s safety.⁸² Only designated test sites were authorised to distribute the drug, to a selective group of women, ensuring that the efficacy of the drug, potential side effects, and dangers attendant on its use were

so as to conform with the dictates of reasonableness), the Court did not supplement its declaratory order with any structural mechanism through which compliance with it could be assured. Perhaps predictably, there was limited compliance with the order. More significantly, the order did not result in the alleviation of the housing needs of the successful litigants.” M. Pieterse, *Eating Socioeconomic rights: Usefulness of Rights Talk in Alleviating Social Hardship Revisited*, 29 HUMAN RIGHTS QUARTERLY (2007) 796-822, at 808; See e.g. K. Pillay, *Implementation of Grootboom: Implications for the Enforcement of Socio-Economic Rights*, 6 LAW, DEMOCRACY & DEV. (2002) 255-277.

⁷⁹ L. Forman, *supra* note 32.

⁸⁰ *Grootboom* at ¶40-44.

⁸¹ *T.A.C.* at ¶2.

⁸² *T.A.C.* at ¶16.

carefully monitored.⁸³ Also, a formal ban on the drug was in effect for all other clinics in the country. At that stage, the government did not provide any precise timeline to health care providers for the expected completion of the testing programme.⁸⁴

The government made its case out of the reasonableness of the program and its preoccupation with cost containment and the safety of the people involved in the drug trial. It also pointed out its disbelief in the judicial review of health policy, questioning the democratic legitimacy of the process.

This case then became a test of the Court's willingness to meaningfully enforce the State's duties under section 27. The Court went ahead and firmly rejected the government's arguments that the judicial review of health policy constituted a breach of the separation of powers, or that its judgements could be characterised as declaratory orders.⁸⁵ Also, it successfully reaffirmed its constitutional authority to order injunctive relief and supervisory orders.⁸⁶ It is certainly the consequences for millions of HIV-infected South Africans that could see their livelihood greatly

⁸³ Ibid. at ¶19.

⁸⁴ Ibid. at ¶18.

⁸⁵ "There is...no merit in the argument advanced on behalf of government that a distinction should be drawn between declaratory and mandatory orders against government. Even simple declaratory orders against government or organs of State can affect their policy and may well have budgetary implications. Government is constitutionally bound to give effect to such orders whether or not they affect its policy and has to find the resources to do so. Thus, in the *Mpumalanga* case, this Court set aside a provincial government's policy decision to terminate the payment of subsidies to certain schools and ordered that payments should continue for several months. Also, in the case of *August* the Court, in order to afford prisoners the right to vote, directed the Electoral Commission to alter its election policy, planning and regulations, with manifest cost implications." (Minister of Health & Others v Treatment Action Campaign & Others, ¶99, 5 SA (2002).)

⁸⁶ *T.A.C.* at ¶112.

impacted by the availability of Nevirapine that weighted in the decision⁸⁷, although the Court deeply underpinned its judgment with the experts testimonies presented by both parties.⁸⁸

It is also important to highlight that the cost of implementation of the remedial measures ordered by the Court was minimal. It was well within the government's budget to provide Nevirapine to the overall population. The Court found that the additional costs associated with providing testing, counselling, and breastfeeding were negligible. This case shows again the Court's tendency to privilege contextual circumstances over issues of constitutionality when adjudicating resource allocation cases.

Although deciding on a political issue rather than on the constitutionality of the case, the Court showed respect for the separation of powers asserting that it would be for the "government...to devise and implement a more comprehensive policy that will give access to health care services to HIV-positive mothers and their new-born children, and will include the administration of Nevirapine where that [was] appropriate."⁸⁹

⁸⁷ Ibid. at ¶19.

⁸⁸ Ibid. at ¶ 6-7.

⁸⁹ Ibid. at ¶122.

Heinz Klug pointed out, that *T.A.C* goes beyond *Grootboom* by providing the government with a rather specific directive.⁹⁰ The fact that both cases do not equate to a typical rationing dilemma unlike the one presented in *Soobramoney*, results in the Court refusing to go forth with structural interdicts. Nonetheless, it still proceeded with declaratory and mandatory orders without retaining jurisdiction.⁹¹ The Court believed the directive was robust enough since “the government [had] always respected and executed orders (...) [,and that there was] no reason to believe that it [would] not do so in the present case”.⁹² The Court’s discussion of the relief it is capable of imposing is commendable, nonetheless it seems that no lessons were learned from the mistakes made in *Grootboom*.

In sum, *T.A.C.* enabled the Court to reaffirm its reasonableness standard of review and emphasise the sometime limited role of the judiciary in intergovernmental relations.⁹³

⁹⁰ H. Klug, *Five Years On: How Relevant Is the Constitution to the New South Africa?*, 26 VT. L. REV. (2002) 803-808, at 808.

⁹¹ D. Bilchitz, *supra* note 49, at 24.

⁹² *T.A.C.*, ¶129.

⁹³ *T.A.C.* at ¶38; “Courts are ill-suited to adjudicate upon issues where court orders could have multiple social and economic consequences for the community. The Constitution contemplates rather a restrained and focused role for the courts, namely, to require the state to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation. Such determinations of reasonableness of these measures to evaluation. Such determination of reasonableness may in fact have budgetary implications, but are not in themselves directed at rearranging budgets. In this way the judicial, legislative and executive functions achieve appropriate constitutional balance.”.

E. Mazibuko and Others v City of Johannesburg and Others

In 2008, the Constitutional Court rules on the Mazibuko and Others v City of Johannesburg and Others⁹⁴ (*Mazibuko*) case. Applicants petitioned the Court to consider whether the installation and operation of prepaid water meters, automatically disconnecting when reaching the quota set by Free Basic Water policy (FBW), and making it impossible to get any additional water without credit, were legal. In this case it was never disputed that all applicants were greatly and equally disadvantaged. The Court had then to consider whether the FBW policy was reasonable with reference to section 27(1) and (2) of the Constitution guaranteeing the right of access to sufficient water.⁹⁵

It appears that the Court produced a judgment that is the exception confirming the rule. Indeed, it rejected any context-based arguments, and found that the City of Johannesburg's FBW policy fell well "within the bound of reasonableness".⁹⁶ Also, the applicants' poverty, and the fact that no adequate access to water was provided causing them great hardship were bluntly disregarded; in fact these undisputed facts received no real attention in the judgment.

Instead, the Court chose to focus on bureaucratic data relating to the city's difficulty to supply water in Soweto. Many scholars were disappointed with this

⁹⁴ *Mazibuko v City of Johannesburg* 2010 4 SA 1 (CC).

⁹⁵ S. Wilson and J. Dugard, *Taking Poverty Seriously: The South African Constitutional Court and Socio-Economic Rights*, 3 STELL L.R. (2011) 664-682, at 673-674.

⁹⁶ *Mazibuko*, supra note 103, at ¶9.

judgment as the evaluation of the policy was conducted in the abstract, and the justifications provided by the city were instantly taken at face value without any contextualising efforts.⁹⁷

F. The Importance of Learning from the Past and Contextualising

Apartheid had long symbolised the disenfranchisement of the black population, and had institutionalised a system that maintained white domination and privileges in the political, economic, social and cultural spheres.⁹⁸ A great majority of South Africans were deprived of political freedom, and the means to secure economic prosperity. Understood in the light of this context, the Constitution had to fuel the political transformation necessary to create a democratic society based on respect for differences, and to facilitate social and economic change.⁹⁹ It was also the ultimate post-apartheid ‘institution’ that helped to increase the new government’s legitimacy and accountability. Today, the provisions of the Bill of Rights must still be interpreted with reference to this historical context, and in the light of present social and economic conditions.¹⁰⁰ Fundamental to an understanding of these conditions is the acceptance that great discrepancies in wealth and social status are still very much present in the country.¹⁰¹

⁹⁷ S. Wilson and J. Dugard, *supra* note 104, at 676.

⁹⁸ S. Liebenberg, *supra* note 11.

⁹⁹ P. De Vos, *supra* note 31, at 263.

¹⁰⁰ *Soobramoney* at ¶9.

¹⁰¹ P. De Vos, *supra* note 31, at 263.

The Constitutional Court has time and again emphasised the importance of taking into account the historical, social and economic context in the interpretation it makes of the provisions of the Bill of Rights.¹⁰² The understanding of the scope and content of the various socio-economic rights depends on an understanding of the history that led to the constitutional provisions.¹⁰³ Justice Yacoob reiterated in *Grootboom*, that the contextual interpretation of rights requires the consideration of two types of contexts. First the textual context, that leans on Chapter II and the overall Constitution. Second, the scope and meaning of the Bill of Rights, that is to be interpreted bearing in mind the country's historical background.¹⁰⁴

Determination of the constitutionality of state action or inaction relating to the realisation of social and economic rights is therefore conducted with reference to the impact these policies, or lack thereof, could have on the group under scrutiny. In three out of the four landmark cases, the Court conducted its review keeping in mind structural and social inequalities, and paying closer attention to existing discrepancies between specific groups.¹⁰⁵ As constitutional law Professor Pierre de Vos points out:

“What is required is to take into account the *impact* of the state's action or omission on a specific group with reference to the social and economic context within which the group finds itself. State plans aimed at the progressive realisation of any of the social and economic rights guaranteed in the Constitution that fail to take cognisance of the different ways in which the

¹⁰² *Grootboom* at ¶25.

¹⁰³ P. De Vos, *supra* note 31, 263.

¹⁰⁴ *Grootboom* at ¶22.

¹⁰⁵ C. Albertyn and B. Goldblatt, *Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality and a Compassionate Justice* 13 SAJHR (1997) 225-60 ; Hon. Claire L'Heureux-Dubé *Making a Difference: The Pursuit of Equality and a Compassionate Justice* 13 SAJHR (1997) 338-41.

plan will impact on groups within different social and economic contexts will be constitutionally suspect. Some groups would have suffered from ‘patterns of disadvantage and harm’ in the past due to their race, sex, gender, class or geographical location and will be economically particularly vulnerable. The more economically disadvantaged and vulnerable a group is found to be, the greater the possibility that a court may find that there was a constitutional duty on the state to pay special attention to the needs of such a group.”¹⁰⁶

The transformative nature of the Bill of Right needs to be accepted in order to understand how socio-economic right judgements such as *Soobramoney* and *Grootboom* are in fact consistent. Although the outcomes could be perceived as contradictory both cases provide tools for the implementation of rights in their respective contexts.¹⁰⁷ Evidently, these two decisions differ in the claim brought before the Court by the plaintiff, in *Soobramoney* the grievance relates to the right of an individual to treatment, whereas in *Grootboom* it is a collective action to redress the violation of the right of a ‘segment’ of the population. This helps to further explain the changing nature of the standard of review and the different approach the Court took in rendering both judgments.

In a nutshell, the Court’s reasoning is supported by the transformative Constitution and aims at giving back rights to previously or presently disenfranchised groups in order to finally level the playing field. In the context of socio-economic rights, the Constitution confers a wide discretion to the courts to ensure that the

¹⁰⁶ P. De Vos, *supra* note 31, at 267.

¹⁰⁷ *Ibid*, at 259.

needs of vulnerable groups are met. Although severely criticised over the past decade, the impact of this wide remedial power is undeniable and reinforced by the jurisprudence developed by the Constitutional Court.¹⁰⁸

II. THE SOUTH AFRICAN CONSTITUTIONAL DIALOGUE

REVISITING THE SEPARATION OF POWERS DOCTRINE

A. The Origin of the ‘Distinctive’ Separation of Powers Doctrine

The doctrine of separation of powers lies with the functional understanding that democracy and the rule of law must be divided, and that these powers should mutually check and balance each other.¹⁰⁹ The doctrine takes its roots in the Enlightenment period of the seventeenth-century in Europe. The abusive and absolute power of the monarchs was then put into perspective by political thinkers that aspired to reorganise schemes of governance. The goal was to prevent the accumulation of power in a single institution.¹¹⁰ The traditional approach to the separation of powers doctrine is usually based on the assumption that the constitution represents an end in itself. Indeed, this formal document ultimately aims

¹⁰⁸ K. Pillay, *supra* note 87.

¹⁰⁹ S. Seedorf and S. Sibanda, *supra* note 6.

¹¹⁰ *Ibid.*

at regulating the exercise of power and preserving the rights of individuals in a political community.¹¹¹

The modern concept of separation of powers draws a lot from its origins, but adds on to it in some aspects by being more concerned with organisation theory and the design of an ideal structure of power. This doctrine is most often times portrayed as a concept that should be depoliticised, formalised, as well as justificatory.¹¹² Furthermore, the modern doctrine also caters for the cases where one of the branches improperly exercises its power, and for probable scenarios where government has to organise and coordinate solutions to complex problems.¹¹³

Originally South Africa had a Westminster system of centralised power lying within an elected Parliament.¹¹⁴ After the democratic shift in 1994, the drafters of the first democratic Constitution had separation of power on their priority list as it was, and still is, a synonym of good governance and democracy.¹¹⁵ The First Certification of the Constitution Judgment stated that no universal model of separation of powers was ever coined and therefore, that no absolute doctrine could ever be achieved merely with checks and balances.¹¹⁶ This partly explains why the 1996 Constitution is

¹¹¹ P. De Vos, *supra* note 31, at 260.

¹¹² M. Loughlin, *Constitutional Law: The Third Order of the Political*, in N. Bamford and P. Leyland, *Public Law in a Multi-Layered Constitution*, Hart Publishing (2003) 27-51.

¹¹³ S. Seedorf and S. Sibanda, *supra* note 6.

¹¹⁴ S. Woolman and J. Swanepoel, *Constitutional History*, in S. Woolman and M. Bishop (eds), *Constitutional Law of South Africa Vol. 1*, JUTA (2008) 1.

¹¹⁵ S. Seedorf and S. Sibanda, *supra* note 6.

¹¹⁶ *Certification of the Constitution* at ¶108.

silent on the topic. The concept, and a more fluid understanding of it are obviously to be implied from the drafting.¹¹⁷ In the Court's words separation of powers should

“embod[y] a system of checks and balances to prevent an over-concentration of power in any one arm of government it [should] anticipate the necessary or unavoidable intrusion of one branch on the terrain of another; this engenders interaction, but does so in way which avoids diffusing power so completely that government is unable to take timely measures in the public interest.”¹¹⁸

Also implied is the crucial role reserved to courts making them the guardians and promoter of fundamental constitutional values.¹¹⁹ South African courts are made final arbitrators of the nature and extent of the power of all branches¹²⁰, they also ensure that all “act in accordance with, and within the limits of, the Constitution”.¹²¹

The drafting provides fertile ground for a constitutional dialogue between all branches of the government. A system of mutual control and accountability is established primarily through the judicial review of governmental actions. Although the harmonious system has in part achieved its transformative goals South Africa's model of separation of powers further ensures that the doctrine does not become static or hermetic to social change.¹²²

¹¹⁷ S. Seedorf and S. Sibanda, *supra* note 6.

¹¹⁸ S v Dodo, ¶16.2, 382 SA (2001).

¹¹⁹ Preamble S.A. CONST.

¹²⁰ S.A. CONST. §44, cl.4.

¹²¹ S. Seedorf and S. Sibanda, *supra* note 6.

¹²² *Certification of the Constitution* at ¶111.

Consequently the concept is the source of abstract rules reshaping powers and functions producing some checks and balances.¹²³ As Seedorf and Sibanda explain further:

“The point about checks and balances is precisely that they do provide for interference between the branches of government. The courts are asked carefully to examine if such interference is an unwarranted intrusion into the domain and independent functioning of one branch of government or another constitutional body, or if such interference constitutes an institutional safeguard designed to prevent the abuse of power. (...) Checks and balances allow for interdependencies, but these must be safeguarded against abuse of power.”¹²⁴

This ‘distinctively’ South African doctrine has developed thanks to the transformative adjudication process led by its Constitutional Court. No international precedents can constrain the application of this unique model. Overall the South African model of separation of powers is more concerned with guiding principles than predetermined answers.¹²⁵

B. The South African ‘trialogue’

The South African Constitution envisages interactions between power-sharing institutions.¹²⁶ Although all of the branches of government have pre-eminent domains and are independently required to carry out their respective missions, they are still led down the road of interdependency when it comes to the implementation

¹²³ S. Seedorf and S. Sibanda, *supra* note 6.

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*

¹²⁶ S. Ngcobo, *supra* note 8, at 47.

of comprehensive and participatory social programmes and legislation. This distinctively South African relationship maintained by the different branches of power predates the Constitution. In fact, the *Certification Judgement* itself evidences the “constitutional dialogue” since courts were already given the opportunity to discuss the extent and constitutionality of other branches’ actions at that stage.¹²⁷

Post certification, the dialogue can unfold in three possible ways. On the one hand, the Court proceeds to the judicial review of legislation or conduct, striking down any inconsistency with the Constitution. It will also identify the defects, and methods to fix any of the uncovered issues, and will allow other branches to redress any inconsistencies. Second, when members of the executive apply to the Constitutional Court seeking constitutional review of a bill, the Court will make its assessment with careful consideration to insure it does not infringe on other branches’ roles. Finally, in the realm of socio-economic rights adjudication, when the court is seized to evaluate a governmental policy, it will decide whether the policy is reasonable, or identify deficiencies, and if necessary allow the government to remedy.¹²⁸ The Constitutional Court is guarding the Constitution while respecting its institutional function, preventing the executive and the legislature from accumulating too much power. While fulfilling its constitutional mandate it also guarantees institutional security with its capacity to check and balance the other branches of

¹²⁷ Ibid, at 42.

¹²⁸ S. Ngcobo, *supra* note 8, at 43.

government.¹²⁹ This method naturally nurtures the constitutional conversation between the different branches. It also ensures that all branches never run afoul of the Constitution.¹³⁰

Manifestly institutions are engaged in a dialogue thanks to their core functions. They respect their respective constitutional roles and participate in upholding the Constitution.¹³¹ This approach results in the harmonious meshing of independence with interdependence.¹³² In the context of socio-economic rights, adjudication remains circumscribed to available state resources. Therefore, the justiciability of socio-economic rights implies some form of scrutiny, however limited, of financial and budgetary decisions. This is both unavoidable and necessary.¹³³

It is the distinctiveness of South Africa's history that creates its unique balance of powers doctrine. Thanks to the 'dialogue' courts can complete the political power's potential failures. Nonetheless, outside the courtroom the judiciary has little but no say in the dealings of any other branches of the government. This 'pick-and-choose' approach is particularly useful in addressing separation of powers issues.¹³⁴

¹²⁹ S. Seedorf and S. Sibanda, *supra* note 6.

¹³⁰ S. Ngcobo, *supra* note 8, at 43. On related topics, it will also be interesting to follow the development of the controversial *Discussion Document on the Transformation of the Judicial System and the Role of the Judiciary in a Developmental South African State* published by the Ministry of Justice and Constitutional Development on 28 February 2012, on-line at (<http://www.justice.gov.za/docs/other%20docs/20120228-transf-jud.pdf>).

¹³¹ *Ibid*, at 48.

¹³² S. Seedorf and S. Sibanda, *supra* note 6.

¹³³ Pierre De Vos, *Pious Wishes or Directly Enforceable Human Rights?: Social and Economic Rights in South Africa's 1996 Constitution*, 13 SAJHR (1997) 67-97 at 97.

¹³⁴ S. Seedorf and S. Sibanda, *supra* note 6.

Certain functions and powers fall squarely under one of the branches' purview and monopoly. The balancing act triggered by this constitutional 'trialogue' holds up because of the branches' mutual respect of their pre-eminent domains. Interference with pre-domains cannot be permitted or excused on the account of 'check and balances'.¹³⁵ In *T.A.C.*, the Court made this point stating that:

“[A]lthough there are no bright lines that separate the roles of the legislature, the executive and the courts from one another, there are certain matters that are pre-eminently within the domain of one or other of the arms of government and not the others. All arms of government should be sensitive to and respect this separation.”¹³⁶

The pre-eminent domain doctrine does not constitute an absolute bar on judicial intervention, but demands a higher level of justification for judicial intervention.¹³⁷

The separation of powers manifests itself beyond specific guarantees. The legislature and the executive are independent but still pursue their policy goals attentively and remain sensitive to all other branches' advice. Obviously, the Constitution cannot provide for all aspects of life. This leaves considerable latitude for a range of policy decisions, all of which must still be made in conformity with the Constitution.¹³⁸

¹³⁵ Ibid.

¹³⁶ *T.A.C.* at ¶ 98.

¹³⁷ S. Seedorf and S. Sibanda, *supra* note 6.

¹³⁸ Ibid, at 65.

III. IS AMERICA TRAPPED IN ITS PATH OF DEPENDENCY?

It is hazardous and also difficult to compare the product of two socially and culturally different constitutional systems. Nonetheless it is still interesting to draw a comparison between the American and South African Constitutional Courts when it comes to resource allocation. One outstanding difference between these systems is certainly the lack of socio-economic rights in the American Constitution.¹³⁹

A. The Rejection of the Socio-Economic Rights

The rejection of socio-economic rights by the American legal system is rooted in a much deeper debate than the mere labelling of certain rights under this category. It is more the constant balancing act between promoters of a more interventionist State in favour of a broad redistribution of resource, and a more conservative neo-liberal faction that wishes to see State freedom and overall liberties better protected that runs the debate.¹⁴⁰ Paradoxically, one may forget that the promotion of freedom and property protection also requires extensive resources from the State. Therefore, even watchman-type States require some degree of intervention and redistribution, even if ultimately it results in favouring the interests of private property owners and not the poor. In this respect, it is only fair to say that one cannot be concerned with freedom without being concerned with subsistence.¹⁴¹

¹³⁹ According to Mark S. Kende: "In *Lindsey v Normet*, the Court said: "We do not denigrate the importance of decent, safe, and sanitary housing. But the Constitution does not provide judicial remedies for every social and economic ill." See M.S. Kende *supra* note 9.

¹⁴⁰ L. Forman, *supra* note 32.

¹⁴¹ S. Seedorf and S. Sibanda, *supra* note 6.

The absence of socio-economic rights in any legally binding or formalised document may also flow from a disagreement on distribution at a national level, and the ferocious opposition of many lobbying groups having vested corporate interests militating against their implementation at the international level.

Also, the contours of civil-political and socio-economic rights are distinct, the former being more interpretative, whereas the latter are more determinative.¹⁴² The American constitutional tradition assumes that courts will see their task lightened with the enforcement of negative political and civil rights rather than positive socio-economic rights. This may be because it is simpler for a court to order the government to stop interfering with a constitutional right, rather to make some intricate budgetary determinations.¹⁴³ Nevertheless, Mark Tushnet, Cass Sunstein, Sandra Liebenberg, and others scholars established that enforcing negative rights also implicates budgetary matters. Sunstein supports that:

“So-called negative rights are emphatically positive rights. In facts rights, even the most conventional, have costs. Rights of property and contract, as well as rights of free speech and religious liberty, need significant taxpayer support.”¹⁴⁴

Conversely to the South African Bill of Rights that opts for a ‘laundry list’ approach to these rights,¹⁴⁵ the United State Supreme Court has only implied the existence of certain fundamental personal rights flowing from personal rights in the

¹⁴² K. Lehmann, *supra* note 50, at 166.

¹⁴³ P. B. Eldeman, *The Next Century of Our Constitution: Rethinking Our Duty to the Poor*, 39 HASTINGS L.J., (1987-1988).

¹⁴⁴ C.R. Sunstein, *supra* note 1.

¹⁴⁵ *See* M. S. Kende, *supra* note 9.

liberty provision of the Fourteenth Amendment's Due Process Clause¹⁴⁶. It is with the Supreme Court's interpretation of *Lochner v New York*¹⁴⁷ that the basic criteria were fleshed out. Nonetheless, the American Supreme Court has systematically rejected socio-economic rights claims under both Substantive Due Process and Equal Protection Clause doctrines, although it has shown to be more receptive to hybrid "equal protection fundamental interests" claims,¹⁴⁸ but even then, the Court has tried to find a different angle, such as the right to travel or the right to vote.¹⁴⁹

The reluctance of American judges to enforce, or all together recognise these rights may also be explained by some fundamental cultural differences. The strong European heritage present in South Africa's policy making translates into the crafting of laws that aim at eradicating discrepancies between social classes, whereas American policy makers tend to reject the idea of classes and therefore believe that the existence of socio-economic rights cannot be justified in a society where all is within reach with hard work and determination, and this is regardless of one's economic background.

Surprisingly enough, in some respects the South African Constitutional Court has been inspired by the American model. Nonetheless, it has proven to take a more

¹⁴⁶ U.S. CONST. amend. XIV.

¹⁴⁷ 198 U.S. 45 (1905).

¹⁴⁸ E. Chemerinsky, *Constitutional Law*, Walters Kluwer (2002).

¹⁴⁹ *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 670 (1966) (holding that poll taxes which effect the rights of the poor are unconstitutional because they discriminate regarding the right to vote).

flexible approach to the political question doctrine.¹⁵⁰ The stringent conception of judicial review in America has forced the Supreme Court to decline standing to any political question. This approach was authoritatively declared in *Baker v Carr*¹⁵¹. Although constitutional questions remain inevitably political questions, in his opinion Justice Brennan reiterates that the political question doctrine is “essentially a function of separation of powers”.¹⁵²

Comparatively, political questions in South Africa are not political matters or cases in nature. The determining factor remains the methodology to be applied by the court in rendering its judgment. Questions that fall under the ambit of the political question doctrine are essentially the ones for which the Constitution does not provide a review standard.¹⁵³

The line between a political and a legal question should not be drawn based on the subject matter of the dispute, but rather on whether the adjudicated claim can be resolved through the application of the law. Furthermore, the classification of an issue as ‘political’ should not be determinative of whether or not a court has standing

¹⁵⁰ S. Seedorf and S. Sibanda, *supra* note 6.

¹⁵¹ *Baker v Carr*, 369 US 186 (1962).

¹⁵² *Ibid*, “Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for discovering it; or the judicial discretion; or the impossibility of a courts undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for the unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.” (at 217).

¹⁵³ S. Seedorf and S. Sibanda, *supra* note 6.

to adjudicate on the matter.¹⁵⁴ The standing of political questions in the United State should therefore be revisited in order to adjudicate on issues relating to resource allocation and ‘socio-economic rights type of cases’.

B. The American Firm Take on the Separation of Powers Doctrine

The omnipresent fear of usurpation of power by one of the branches of government in America has guided institutions to favour a ‘pure’ separation of powers doctrine. The role of the courts is confined to the observation of allocation issues. The courts will not act as an active agent of change and proceed to prescription for the allocation of State resources. The American conception of separation of powers implies that specific functions, duties and responsibilities be granted to distinctive institutions with strictly defined areas of competence and jurisdiction.¹⁵⁵ This is based on the rationale that specialised institutions are better equipped to perform particular functions.¹⁵⁶ The words of Montesquieu seem to animate the spirit of the American doctrine:

“[There is no] liberty if the power of judging is not separate from legislative power and from executive powers. ...All would be lost if the same man or the same body of principal men, either of nobles, or of the people, exercised these three powers: that of making the laws, that of executing public resolutions, and that of judging the crimes or the disputes of individuals.”¹⁵⁷

¹⁵⁴ Ibid.

¹⁵⁵ S. Seedorf and S. Sibanda, *supra* note 6.

¹⁵⁶ Ibid.

¹⁵⁷ C. De Secondat De Montesquieu, *The Spirit of Laws*, A. M. Cohler, B. C. Miller & H. S. Stone (eds.) (1989).

On the other hand, the check and balances system coupling the separation powers of doctrine ensures that institutions do not become self-centred in the execution of their roles and that their functions are efficiently fulfilled.¹⁵⁸

The American Supreme Court firmly believes that “the Constitution does not empower [the] Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients.”¹⁵⁹ In this very same foundational case, *Dandridge v Williams*, the Court itself strongly replicates that “problems presented by public welfare assistance programs are not the business of [the] Court.”¹⁶⁰

The American separation of powers doctrine leaves no room for the commingling of the different branches’ interests or functions. It is the rigid application of the doctrine that accounts for the Court’s reluctance to recognise a more flexible approach, and explains its coy attitude towards the adjudication of resource allocation cases.

¹⁵⁸ S. Seedorf and S. Sibanda, *supra* note 6.

¹⁵⁹ *Dandridge v. Williams*, 397 U.S. 471, 487 (1970).

¹⁶⁰ *Ibid.*

C. The US Health Care Reform and Allocation of Resources Problem

The American health care system currently faces issues flowing from its particular financing scheme. Paths of dependencies make it uneasy to restructure the overall distribution processes without encountering some hurdles. The system remains largely operated by private sector insurers, reducing their liability and increasing their profit margins by applying drastic underwriting rules; thus leaving a majority of the population in the hands of publicly-funded programs that are already exhausting government budgets.

The health care reform put in place by the Obama administration is an attempt to tackle the system's shortcomings. Having been challenged four times before federal judges¹⁶¹, the fate of the reform was put in the hands of the Supreme Court¹⁶². The constitutionality of the ACA's¹⁶³ individual mandate that requires all Americans to maintain some form of health insurance is now certain. Indeed, on June 28, 2012 the Supreme Court finally published its decision to uphold the individual mandate. Four out of five Supreme Court judges voted in favour of that decision.

¹⁶¹ See *e.g.*, State of Florida, et al., v. United States Department of Health & Human Services., et al., No. 11-11021; Commonwealth of Virginia v. Sebelius, No. 3:10-CV-188; Liberty University v. Timothy Geithner, No. 10-2347; Margaret Meade v. Eric Holder, No. 1:10-CV-00950; Thomas More Law Center v. Barack Obama, No 111-148.

¹⁶² National Federation of Independent Business et al. v Sebelius, Secretary of Health and Human Services, et al., 567 U.S. (2012)

¹⁶³ H.R. 3590, 111th Cong. (2009-2010), Public Law 111-148.

Chief Justice Roberts offers a long and complex opinion analysing the reasons behind the surprising judgment. Some saw in his discourse a high-minded approach paving a new way forward to finally bring together the Court across its ideological divide, thus taking a first step in restoring its reputation. Many others found to the contrary that his opinion was only an impoverished reading of the Commerce Clause jurisprudence that will result in further narrowing the powers of the Federal government over the coming decades.¹⁶⁴

Many scholars had hoped that the challenge would create an opportunity for high-level constitutional lawyers to bring forward resource allocation issues, and for Justices to craft a targeted solution directly addressing the topic of health care. Unfortunately, this decision does not constitute an ‘out of the box’ judgment. No core issues surrounding health care resource allocation were directly addressed or even really argued in front of the Supreme Court. All constitutionality issues were strictly resolved through constitutional and political considerations. Furthermore, no real contextualisation effort was made on the part of the Chief Justice despite Justice Ginsburg’s opinion that certainly aimed at addressing the particular nature of health care and its allocation.¹⁶⁵

¹⁶⁴ D. Harlow (<http://healthblawg.typepad.com/>).

¹⁶⁵ “Unlike the market for almost any other product [(including broccoli)] or service, the market for medical care is one in which all individuals inevitably participate. Virtually every person residing in the United States, sooner or later, will visit a doctor or other health care professional.” *in* 567 U.S. 67 (2012).

In a nutshell, the Court's ruling makes the individual mandate a mere invitation to buy insurance rather than an order. The Supreme Court failed to grasp the uniqueness of health care as a common good. The judgment is not based on the right to health but on an interpretation of the Constitution that sways universality of care far away from any legal debate.

In this case and over the years, the American Supreme Court has not been keen on recognising the importance of contextualisation. Nonetheless, if it was to take a closer read of its health care financing history it would bring itself to understand that the law and its interpretation cannot withdraw itself from the path health care financing and services authorities have paved for themselves. Changes need to be operated at the judiciary level to reach better allocation. A contextualised approach is now necessary to solve the pressing insurability problem.

D. Are Cases Dealing with Segregation Providing Part of the Solution?

Unbeknownst to itself, the American Supreme Court has in the past provided a potential solution to its hermetic separation of powers doctrine and resource allocation issues. The Court has provided efficient injunctive relief and remedy. The foundational civil right case *Brown v Board of Education of Topeka (Brown)*¹⁶⁶ and its

¹⁶⁶ *Brown v Board of Education of Topeka*, 347 U.S. 483 (1954).

related cases¹⁶⁷ mark a turning point for the American legal system, partly for the change it ingrained in the 1950s society, and for its repercussion in time. Finally banning segregation in the school system, the legal crafting emanating from the case also triggered an original remedy system. In this landmark case the Court empowered itself and bent the boundaries of separation of powers to provide a more efficient resolution. The case was propelled by the necessity to transform the dual school system based on race originally instigated and supported by the Supreme Court's ruling in *Plessy v Ferguson*¹⁶⁸. Needless to say that a 'classic one-stance' ruling and remedial solution on the part of the Supreme Court could not have palliated hundreds of years of segregating practices. The expectations were high, therefore important organisational reforms¹⁶⁹ had to be put in place. The lower courts had the mission to transform the entrenched *statu quo*. Most importantly, compliance and follow up mechanisms had to be imagined. In sum, lower courts were mandated with reconstructing a social reality in a radical manner.

Bearing in mind all of these implications the Supreme Court proceeded with supervisory orders to be closely followed by the defendants and all schools in the nation. The Court provided advice on the way lower courts should discharge their roles, and further added to the promotion of principles of equity "characterised by a

¹⁶⁷ Griffin v County School Board of Prince Edward County, 377 U.S. (1964).

¹⁶⁸ Plessy v Ferguson, 163 U.S. 537 (1896).

¹⁶⁹ Organisational programs included: establishing new procedures for students assignments, new criteria for the constructions of schools, a revision of transport routes, reassignment of faculty, curricular modifications, reallocation of resources and establishing equity in the school system.

practical flexibility in shaping the remedies and facility for adjusting and reconciling public and private needs” to their mission.¹⁷⁰

This ruling exemplifies the ‘uber’ power the Court is capable of granting itself in order to achieve ambitious and profound social change. The Court wittily interfered with the executive in providing lower courts and other public institutions with strict guidance to comply with its supervisory orders. It further demonstrated its capacity to deal with a more fluid balance of power, making it a strong agent of change. This jurisprudence evidences the catalytic power the Supreme Court can trigger to make the American society more just. This segregation foundational jurisprudence may very well hold part of the solution to health care resource allocation problems.

IV. LEGAL TRANSPLANTS A CURE FOR ‘CONSTITUTIONAL ILLS’?

A. No transplantation of Rights, Only Just Implementation

More than the potent power of socio-economic rights and their presence in a legal corpus, the key to a just distribution of common goods lies with a proactive method of adjudication. As exemplified by the *Brown* case just distribution and efficient implementation reside in a more ‘hands-on’ approach taken by the Court.

¹⁷⁰ C. Mbazira, *Litigating Socio-Economic Rights in South Africa a Choice Between Corrective and Distributive Justice* (2009).

The United States and South Africa are very similarly situated when it comes to health care issues. Both countries have to deal with their past, for one it is the deeply engrained libertarian roots leading the debate in health care policy and the predominant place taken by the private sector in the distribution of care; for the other it is a clearly identifiable venerable group previously disenfranchised with growing health needs. The different solutions coined to alleviate scarcity in both of these countries remain inadequate due to the reluctance of the Supreme Court to contextualise and embrace better solutions to sever paths of dependencies, or because of the Constitutional Court's inefficient supervision of remedial measures.

Perhaps the 'constitutional ills' experienced by South Africa and America require a more robust approach to the adjudication of health rights rather than the transplantation of socio-economic rights. Indeed, the American Supreme Court could benefit from a more dynamic reading of the 14th Amendment, Substantial Due Process and Equal Protection Clause doctrine resulting in a more contextualised interpretation of allocation cases. On the other hand, the South African Constitutional Court could benefit from a more direct supervisory role when it comes to the implementation of the remedies it prescribes in allocation cases.

B. The Transplantation of an Interpretative Methodology

An institutional dialogue denotes a healthy democratic process. However, courts should not make any fundamental departure from the doctrine of separation of powers, and for that matter should not feel the need to precisely decide the content of socio-

economic rights or of any rights leading to the allocation of resources. The role of the courts should be interpretative identifying the particular interests falling within the boundaries of the right, all of this in a ‘context-sensitive’ manner. It is important to have the participatory institutions of the executive and the legislature decide on the processes of allocation. The judiciary shall keep in check the two other branches of government to insure that the allocation is properly executed.¹⁷¹

Evidently, while deciding constitutional matters, and more particularly ones involving allocation of scarce resources, judges will have to perform a complex balancing act between their role of protectors of the Constitution and the importance to provide necessary enforcement powers to vulnerable groups.¹⁷² As suggested by Sandra Liebenberg, the courts should operate “a context-sensitive assessment” of the impact the denial of a particular right could have on the claimant.¹⁷³ Indeed, the success of socio-economic rights rests in the possibility to remedy the effects of material deprivation thanks to the ability of these rights to connect with the needs and experiences of the beneficiaries.¹⁷⁴

The transplantation of the South African contextualising adjudication method and the dialogue present amongst the institutions constitute examples to be transplanted in the United States.

¹⁷¹ S. Wilson and J. Dugard, *supra* note 104, at 677.

¹⁷² K. O’ Regan, *Introduction socio-economic rights*, 1 ESR Review (1999).

¹⁷³ S. Wilson and J. Dugard, *supra* note 104, at 672.

¹⁷⁴ M. Pieterse, *supra* note 87, at 799.

CONCLUSION

In spite of the South African Constitutional Court's remarkable contextualising approach and the fact that its jurisprudence has demonstrated that the judiciary can enforce socio-economic rights without intruding into essentially legislative or executive functions;¹⁷⁵ the prescriptions made by the Courts in socio-economic cases raise some intricate social justice questions. It is true that

“over time [the South African] courts [have] develop[ed] a distinctively South African model of separation of powers, one that fits the particular system of government provided for the Constitution and that reflects a dedicate balancing, informed by South Africa's history and its new dispensation, between the need on the one hand to control government by separating powers and enforcing checks and balances, and, on the other, to avoid diffusing power so completely that the government is unable to take timely measures in the public interest.”¹⁷⁶

A recurring theme in deliberation on health-related cases is the ‘inescapable reality’ of resource scarcity leading to rationing processes. Individual needs will have to be ranked and potentially sacrificed resulting in a ‘tragic choice’.¹⁷⁷ Evidently, this will lead to the non-satisfaction of particular needs putting the Court at the heart of the distribution processes.¹⁷⁸ Nonetheless this should not justify individual entitlements always being sacrificed in favour of the ‘common good’.¹⁷⁹ The enforcement of socio-economic rights potentially holds the solution to palliate the

¹⁷⁵ Mark S. Kende, *supra* note 9, at 153.

¹⁷⁶ *De Lange v Smuts NO and Others*, ¶60, SA 785 (1998).

¹⁷⁷ M. Pieterse, *supra* note 72, at 533.

¹⁷⁸ *Ibid.*

¹⁷⁹ M. Pieterse, *supra* note 20.

‘inescapable realities’¹⁸⁰ if, and only if, the Constitutional Court subjects the other branches of the government to strict scrutiny, evaluating their implementation of socio-economic rights and providing supervision of remedial measures.

Soobramoney exemplifies the South African Court’s tendency to embrace an inherently utilitarian philosophy when rendering resource allocation judgements. Sacrificing Mr. Soobramoney, and all other similar situated patients, to the interests of the majority reads into having a person’s sacrifice being justified if it results in the promotion of an overarching public interest.¹⁸¹ In the starkest terms, the ruling in this case resulted in a choice between Mr. Soobramoney’s death or the death and suffering of a group of others.¹⁸² Interestingly enough, in the landmark cases heard by the Constitutional Court priority setting was mostly operated along the lines of utilitarian principles. Much naturally, the South African system of adjudication has taken a pragmatic, cost-control driven approach to allocation disputes.

In some commentators’ opinions South Africa has accomplished what the United States Supreme Court has not yet proven capable of achieving: using an innovative contextualising method of interpretation.¹⁸³ Indeed, there is an obvious need for a more flexible separation of power in America, nonetheless it should not be

¹⁸⁰ M. Pieterse, *supra* note 72, at 515.

¹⁸¹ *Soobramoney* at ¶30.

¹⁸² K. Lehmann, *supra* note 50, at 168; *See Soobramoney* at ¶30. “[T]he danger of making any order that the resources be used for a particular patient, [is that it] might have the effect of denying those resources to other patients to whom they might more advantageously be devoted”.

¹⁸³ M. S. Kende, *supra* note 9, at 150.

leaning towards utilitarian prescriptions in the same manner as its South African counterpart. Perhaps both Courts have to learn that the just allocation of resources not only requires flexibility, balancing and contextualisation, but should also reflect just principles, and not strictly efficiency and cost containment determinations.